

Memorandum

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To: Joe Grindstaff
Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

From: Dale Hoffman-Floerke
Deputy Director
Department of Water Resources

Subject: Addendum to Comments on Fourth Staff Draft Delta Plan dated June 13, 2011

I want to thank your staff for meeting with DWR representatives of Office of Chief Counsel on July 15, 2011, to further discuss our comments on consistency determinations with respect to covered actions and Water Resource Policies WR P1, WR P2, and WR P3. The Department is concerned that consistency determinations in relation to the water resources policies listed above may affect our operations and contracting processes.

This memorandum transmits an addendum to our comments originally provided to you on June 24, 2011, to further clarify our concerns and provide you with some additional information.

If you have any questions regarding the Department's comments, please contact me, or your staff may contact Robert Yeadon, Delta Regional Coordinator at (916) 651-7012.



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Deputy Director
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Attachment

cc: Katherine Spanos
Cathy Crothers
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Kathy Kelly

Addendum to Staff Comments of Fourth Staff Draft Delta Plan
Dated 13 June 2011
Department of Water Resources

In our comments submitted on the Fourth Staff Draft Delta Plan dated June 13, 2011, the Department made the following comment with regard to the determination of consistency of "covered actions"

Page 45, lines 1 - 10 (and footnote 7 on page 44)

The text discusses CEQA Exemptions and covered actions. The footnote on page 44 states that "CEQA's various statutory and categorical exemptions (which are considered only after the threshold determination of a CEQA "project" is made) are not similarly incorporated by cross-reference in the definition of covered action." As it stands, projects will have one set of exemptions under CEQA and one set under the Act, and in some cases the same word will have different meanings (as in line 1). It is the Department's understanding that any ministerial act is not considered "ministerial" under the Council's definition unless the statute or action governing the act has been declared to be consistent with the Plan. Does this mean that all existing statutes, ordinances, contracts, etc. would need to have a consistency determination? Would SWP contracts or the current Biological Opinions need a consistency determination?

The Department is concerned about Certifications of Consistency for Covered Actions with respect to Water Resource Policies WR P1, WR P2, and WR P3 and how this would affect Department operations and contracting processes. The following comments are provided to clarify our concerns.

Policies

WR P1, WR P2, WR P3

Page 62, line 31 through page 64, line 29. Also, Page 74, line 32 through page 75, line 2

Please note that the Department is not a water supplier as defined in the WR P1, WR P2 and WR P3 policies. As such, the language about what water suppliers need to do in order to address the Delta Plan's policies does not apply to the Department.

The Department has the following observations with regard to the question raised on page 45 (above) about covered actions and consistency determinations in the context of Water Resource Policies WR P1, WR P2 and WR P3 and State Water Project (SWP) long-term water supply contracts:

- In administering the 29 long-term water supply contracts, the Department must follow provisions in the Central Valley Project Act (CVP Act), Water Code sections 11100 et seq. Specific provisions in the CVP Act that are central to the Department's administration of the long-term water supply contracts are Water Code sections 11160 and 11260. The Department's administration of the long-term water supply contracts is also authorized in the Burns-Porter Act, Water Code sections 12930 et seq. Specific provisions of this Act that are central to the Department's administration of the long-term water supply contracts are 12931, 12934 and 12937. The Department's statutory authority does not appear to allow it to impose on water suppliers additional requirements such as those described in the Policies WR P1, WR P2, and WR P3 as part of the Department's contract approval process.
- Policies WR P1 and WR P3 describe current statutory requirements imposed on urban and agricultural water suppliers. Water Code sections 10630 et seq. require urban water suppliers to submit urban water management plans to the Department. Water Code sections 10800 et seq. require agricultural water suppliers to do the same with their agricultural water management plans. The Department's statutory authority allows it to accept and review those plans (both urban and agricultural) for completeness. Other sections require "conservation oriented" rate structures. Policy WR P2 would impose a new requirement for water suppliers to develop a Water Reliability Plan which appears to overlap some requirements imposed on city and counties in their planning processes by Senate Bills 610 and 221 (2002) which require an assessment and assurance of water supply reliability by local decision-makers when they make certain land use development decisions.
- Compliance with the statutory requirements listed in the previous paragraph is determined through litigation, not agency review. The Department has no authority to evaluate water management plans or other actions of "water suppliers" beyond what the controlling statute permits. Under existing law, the Department does not have the authority to control land use decisions involving private activities or to oversee land use regulation by cities and counties. Even if the Department had the authority to make such decisions at this level of detail, it is not timely or practicable for the Department to analyze each individual decision made by local government that might rely upon increases in SWP water from the proposed project and then to monitor or second-guess each individual decision made by local government or to establish general rules that would govern these decisions. These decisions are within the authority and control of and properly deferred to local decision-makers. This approach is consistent with the traditional

legislative policy that fundamental decisions regarding land use and growth are made through the general planning process at regional and local levels.

- The Department's role in water reliability planning includes the issuance of the SWP Delivery Reliability Report every two years which informs local decision-makers of water supply limitations of SWP water. Although the Department does not have statutory authorization to establish mandatory requirements regarding water reliability and growth, it supports local and regional water planning and conservation efforts through statewide planning and through grants and local assistance programs. Demand reduction and water conservation strategies are important tools in water management planning and the Department is involved in a number of legislative and administrative actions designed to provide a regional or statewide approach to these strategies.

The Department has the following additional general observations about the WR P1, 2, and 3.

- How would an agency show that the need for the action is significantly caused by the failure of one of the water suppliers to comply with policies WR P1, WR P2 and WR P3? There will be multiple agencies, multiple actions and multiple parts of each of the policies – all of which interact. The Department understands that there are many factors and they interact, but it is hard to determine the effect of each one alone. This uncertainty will undoubtedly lead to numerous challenges of inconsistency which even if the covered action is ultimately determined to be consistent could lead to significant delay in carrying out covered actions.
- In addition presumably the action must adversely affect one of the co-equal goals, presumably the goal of protecting, restoring and enhancing the Delta. All activities in the Delta (current and future) are subject to a number of federal and state laws which are designed to regulate actions, including exports, to assure that the Delta is protected, restored and enhanced. Arguably any regulated action, including exports, would not adversely affect the co-equal goals.
- Examples of past efforts with regard to water management grant programs include requirements that a water management plan is a prerequisite for obtaining financial aid (Water Code 10631.5) which limits urban water suppliers from receiving water management grants or loans unless they can show that they are:
 - implementing demand management measures (DMMs);
 - implementing a financing plan, schedule and budget for implementing DMMs; or
 - a DMM is not cost effective.

Granting agencies do not independently assess each determination regarding a DMM.